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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1272

Supreme Court, U.S.
FILED
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MAE CALDWELL, individually and on behalf of her minor son, CHARLES CALDWELL, and all others similarly situated,

Petitioners,

—v.—

DONALD CRAIGHEAD, as Band Instructor at Lebanon High School; ERWIN REED, as Superintendent of Schools for Wilson County, Tennessee; BARRY SUTTON, as Principal of Lebanon High School; THE BOARD OF EDUCATION OF WILSON COUNTY, TENNESSEE; KENNETH HACKNEY, DAVE SMITH, DENVER BATES, PAT BRYANT, CLAUD JENNINGS, T. M. DOBSON, and CARL JOHNSON, all members of the Board of Education of Wilson County, Tennessee; and all other Public School Band Instructors, Superintendents of Schools, Public High School Principals, and Boards of Education and their Members, in the State of Tennessee, jointly and severally, who are similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, one judge dissenting, which affirmed in part and dismissed in part petitioners' appeal from deci-

sions of the United States District Court for the Middle District of Tennessee.

Citation to Opinions Below

The majority and dissenting opinions of the United States Court of Appeals for the Sixth Circuit are reported at 432 F.2d 213 and are set forth in the Appendix, *infra* at pp. 1a-22a. The memorandum and orders of the District Court, denying the petitioners' request for preliminary injunctive relief and granting the defendants' motion for summary judgment, are unreported; they are set forth in the Appendix, *infra,* at pp. 23a-32a.

Jurisdiction

The judgment of the United States Court of Appeals was entered on September 25, 1970. By order dated December 16, 1970, Justice Potter Stewart extended the time for filing this petition to and including January 25, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether a black high school student can be dismissed from the school band for refusing to play the song "Dixie".

2. Whether such a student can bring a class action on behalf of all black citizens in the State of Tennessee to vindicate their rights not to participate in racially offensive ceremonies.

3. Whether such a suit becomes moot because during the appeal the named plaintiffs move to another community within the State.

4. Whether a suit seeking declaratory and injunctive relief with regard to voluntary religious exercises conducted in a public high school becomes moot for the same reason.

5. Whether the finding that a black employee's dismissal was not the result of racial discrimination is supportable where:

   (a) the employee was the only black person on the high school staff,

   (b) a dossier of alleged complaints against the employee was instituted within two weeks of her arrival on the staff, and

   (c) her dismissal stemmed at least in part from her support of her son's protest against playing "Dixie".

6. Whether the right to a fair hearing is compromised when the defendants, in an *ex parte* fashion and prior to the trial court's decision, submit a sheath of unsworn statements bearing on the central issues in the case.

Statement of the Case

During the 1968-69 school year, petitioner Charles Caldwell, a fourteen-year-old black youth, was a student at Lebanon High School, Lebanon, Tennessee, and a member of the school band. He was one of approximately ninety black students in a student body of over twelve hundred students (A. 6a).* As a member of the band he was required to play the song "Dixie" at pep rallies and football games, App., *infra,* p. 25a. Petitioner played the song a few times (A. 58), but came to conclude that the song was offensive to his race and that he was "sick of being a fool" by playing it (A. 59a).

Accordingly, on December 13, 1968 when the band started to play "Dixie" at a pep rally in the school gym, petitioner just walked out (A. 61a). He testified some of the students were shouting "Go back and pick that cotton," some of the teachers stared at him, but that nothing else occurred (A. 61a). On January 3, 1969 this episode was repeated. The students were gathered for a pep rally, and the band struck up "Dixie". As petitioner was walking away, again he heard scattered shouts of "Go back and pick that cotton" and "nigger" (A. 62a-63a). When he approached the door to the gym he was met by his mother, petitioner Mae Caldwell, who had been watching the rally and who then joined her son in walking out (A. 63a-64a). Later that day, petitioner was dismissed from all band activities for the rest of

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* The symbol "A" refers to the Appendix as filed in the Court of Appeals, which is part of the Record filed with the Clerk of this Court.

the year.[1] Mrs. Caldwell discussed the dismissal with the band instructor, Mr. Craighead, and the principal, Mr. Sutton; but the decision stood and petitioner was instructed to turn in his uniform (A. 81a-82a). The "Dixie" incident became a major episode in the school prompting discussion about petitioner and Mrs. Caldwell among faculty and students, App., *infra,* p. 16a. His dismissal resulted in the loss of academic credit given to participants in band activities (A. 126a).

On January 31, 1969, Mrs. Caldwell was terminated from her position as a teacher's aide at Lebanon High School (T. 62).** During her brief tenure, she had been the only black person on the school's staff (A. 120a). The school system made no effort to recruit black employees (A. 157a-58a).

On March 5, 1969 the petitioners filed their class action complaint in the District Court seeking *inter alia* injunctive and declaratory relief. Petitioner sought reinstatement in the band with a declaration that he need not play "Dixie"; Mrs. Caldwell asked restoration of her job and money damages (A. 3a-15a). They claimed violations of their First Amendment rights—petitioner's right to refuse to play "Dixie" without being sanctioned for his exercise of conscience and Mrs. Caldwell's right to support him in his protest—and of their rights to racial equality guaranteed by the Thirteenth and Fourteenth Amendments (A. 6a-11a). The suit was filed as a class action on behalf of

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[1] Apparently the pep band was one of several bands with overlapping membership, App., *infra,* p. 25a. Participation in the pep band was assertedly voluntary, although prestigious, but petitioner was dismissed from all band activities.

** The symbol "T" refers to the transcript of the hearing in the District Court which is part of the record filed with the Clerk of this Court.

all "Negro citizens of Wilson County and Tennessee" against the defendants' classes "all public school band instructors, superintendents of schools, public high school principals, and boards of education and their members in the State of Tennessee." App., *infra,* pp. 13a-15a. Among the common questions asserted were "the rights of Negro citizens to be not required to participate in racially discriminatory programs and ceremonies as a condition of participating in public school activities and programs and employment." App., *infra,* p. 13a. Finally, prior to the preliminary injunction hearing, the complaint was amended to add a cause of action challenging the chapel services customarily conducted at Lebanon High (A. 16a).[2]

At the hearing on a preliminary injunction, the petitioners introduced the deposition testimony of Wendell P. Whalum, an expert in the field of ethno-musicology, who discussed the background of the song "Dixie" and its impact on blacks (A. 166a-88a). "Dixie" was composed in the late 1850's for use as a prelude to minstrel shows which depicted blacks in a derogatory fashion (A. 171a-175a). The intimate nexus between that characterization of black people and the song "Dixie" continues to this day (A. 175a). To both black and white the song is still a potent symbolism of a white supremacist and racist philosophy (A. 182a-86a). Indeed, even Mr. Craighead noted that during his own high school days in Tennessee: "The Negro students weren't too interested in the band program. We had played Dixie" (A. 141a).

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[2] In deposition testimony by Mr. Reed, the principal, it was brought out that the school regularly conducted a chapel program with a devotional exercise. A local minister conducted the program which was kept non-sectarian and "generally Christian" (A. 153a-154a).

In their answer and depositions and at the hearing the defendants offered a variety of justifications for their actions.

Various justifications were proffered for petitioner's expulsion from band activities. The principal testified that the walkout had caused a disturbance; but this turned out to have been merely "talk and gossip" among faculty and students (A. 103a-110a). In a pre-hearing deposition, the band director pointed to the fact that petitioner had earlier been involved in a "racial incident" and had been warned against any repetitions of such incidents (A. 128a-29a).[3] Thus, the petitioner's walking away from the band on January 3 was characterized as the further "racial" incident against which he had been warned (A. 134a). At the hearing, however, there was a shift in emphasis, with primary reliance now being placed upon petitioner's violation of the seemingly neutral "no walkout" rule.[4] Thus the dismissal was ultimately justified as premised on two factors, the earlier "racial" incident and the January 3 "racial" episode: "Now, on January 3, when Chuck made the spectacle, walked out of the band, then that put with this other, the two rules kind of went together" (A. 89a-90a). As the District Court put it, the episode was a "racial incident in direct violation of his rule against walking out of band performances," App., *infra*, p. 26a.

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[3] That episode involved a disturbance in the band instrument room between petitioner and a white female band member (32a-33a; 129a-131a; 138a-140a).

[4] This rule allegedly had its genesis in October 1968 when a number of band members intended not to attend a practice scheduled for the evening before a vacation (A. 132a-133a).

There was a similar tailoring of theories to justify Mrs. Caldwell's dismissal. She thought she had been hired to assist in the teaching of remedial reading (A. 79a), but wound up performing a variety of administrative and clerical tasks at a salary of approximately $1.25 per hour. The initial justification for her dismissal was poor performance of her responsibilities.[5] But the few specific complaints mentioned in deposition or hearing testimony were reasonably explainable (120a-122a). Indeed, the defendants agreed that the allegation of poor performance was not the sole factor motivating petitioner's dismissal. Other factors included her supposed lack of "loyalty to the operation" (A. 162a), her criticism of school policy and practices (A. 162a), and finally and most importantly, her participation in the "Dixie incident" (A. 112a). As dissenting Judge Edwards read the record, "absent Mrs. Caldwell's public expressions of sympathy with her son's protest against playing 'Dixie,' she would have continued in her employment until the end of the school year." App., *infra*, p. 20a.

During the hearing, Mr. Sutton, the principal, was cross-examined concerning the basis for the complaints about Mrs. Caldwell's performance. He referred to a "stack" of written complaints from various teachers which he had turned over to his attorneys (A. 102a). Defendants' counsel acknowledged that he had them, but questioned their admissibility since they were not sworn statements (A. 102a). The District Court replied that the defendants case "certainly would be stronger . . . if you had these written records, or reports that were made back at the time of the

[5] The principal stated that he started compiling a dossier on Mrs. Caldwell shortly after school began in the fall allegedly because he started getting so many complaints (A. 150a-151a).

events, when they actually happened, rather than someone's testimony based on hearsay" (A. 103a). In response counsel promised to furnish the court with these statements.

And so they did. Shortly after the hearing and well before the ruling on the preliminary injunction, two hundred pages of unsworn statements were submitted to the Court (A. 1a, 31a). What defendants' counsel failed to do was notify petitioners' counsel of this submission or provide him with copies of these statements.

On May 7 and 8, 1969 the District Court entered its memorandum and order denying preliminary injunctive relief, App., *infra,* pp. 23a-29a. The court found that Charles Caldwell had been expelled from the band not for refusing to play "Dixie" but for violating the rule against walkouts, App., *infra,* p. 26a. The Court further concluded that Mrs. Caldwell was fired for inability to perform her job, App., *infra,* p. 28a. Subsequently, on July 11, 1969, the District Court granted summary judgment to the defendants on the religious exercise question, holding that the petitioners had no standing to challenge the practice, App., *infra,* pp. 30a-32a.

From these rulings the petitioners appealed to the United States Court of Appeals for the Sixth Circuit. In a 2 to 1 decision that court affirmed part of the rulings below and dismissed the remainder of the appeal as moot. In reaching this result the Court held (1) that the suit was not a proper class action on either side, (2) that, accordingly, most of the issues became moot when the petitioners left Lebanon Tennessee and moved to Nashville pending appeal, (3) that Mrs. Caldwell's dismissal was not based on racial discrimination and (4) that the *ex parte* submission of voluminous

unsworn statements did not deny the petitioners procedural fairness.

It is to review these rulings that petitioners seek a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. This Court should decide whether the First and Fourteenth Amendments afford to black students a right of conscience to refuse to participate in performing the song "Dixie."

The District Court disingenuously found that the petitioner was dismissed not for refusing to play "Dixie" but for violating the "rule" against walking out of band sessions. The majority below did not directly rule on the issue. Circuit Judge Edwards, in dissent, indicated that the state might be able to command a black student to stand still while others played "Dixie," but that if the song were intertwined with racial harassment, there would be a right peaceably to walk away from the performance without suffering any disabilities.

This divergence of views and the Circuit Court's reluctance to resolve the issue reflect the admitted sensitivity of the problem. This suit involves more than just Charles Caldwell's rights. The incidents which led to petitioner's being dismissed from the band were not isolated. The record makes clear that the Lebanon band had played "Dixie" on several previous occasions that fall and that "Dixie" is played on ceremonial occasions throughout the South. Whatever "Dixie" may represent to a white person, to blacks it is a potent and offensive symbol of racism, a "relic" of slavery extolling its virtues.

It is not surprising that a song could have a strong impact on individuals, for music is symbolism, and "symbolism is a primitive but effective way of communicating ideas." *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 632 (1943). Accordingly, in the past few years blacks like the petitioner have refused to be compelled to participate in performing the song because of the ideas it communicates. In response to a suggestion of mootness, petitioners submitted to the Court of Appeals a random sampling of news articles reporting various "Dixie" episodes. Indeed, a national magazine recently reported that the playing of "Dixie" remains a heated issue in schools throughout the South. See "How Desegregation is Working," NEWSWEEK, December 21, 1970, pp. 105-107. Similarly, a District Court recently held that the Confederate flag was a symbol of racism and resistance to desegregation and an affront to black students and ordered all "symbols or indicia" of racism removed from the schools. *Smith* v. *St. Tammany Parish School Board,* 316 F. Supp. 1174 (E.D. La. 1970).

It is against this background that petitioner requests the Court to declare the rights which petitioner and other black students have with regard to the playing of "Dixie." Petitioner does not urge that the song not be played. The relief petitioner requests is more modest—that he not be required to participate in the playing of "Dixie" and in other ceremonies or programs which glorify the virtues of slavery. The doctrinal sources for the recognition of such a right can clearly be found in this Court's decisions.

The primary support is, of course, to be found in *West Virginia State Board of Education* v. *Barnette, supra.* There this Court held that students have a right to refrain from participating in compulsory patriotic ceremonies

which offend their conscience. Playing the song "Dixie," like saluting the flag, "requires affirmation of a belief and an attitude of mind." *Id.* at 633. Such affirmation can no more be extracted on behalf of regional credos than in the service of national creeds. To the extent that "Dixie" manifests a regional orthodoxy which is offensive to petitioner, *Barnette* squarely supports his right of conscience to withhold his participation.

Petitioner's claim of conscience particularly deserves recognition when it is not only based on the First Amendment but is also informed by the right to equality conferred by the Thirteenth and Fourteenth Amendments. By refusing to play "Dixie" petitioner invoked the nation's "affirmative duty . . . [to] eradicate all relics, 'badges and indicia of slavery' . . ." *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 872-73, *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967). See also, *Smith* v. *St. Tammany Parish School Board*, *supra*.

While *Barnette* defines the content of the rights petitioner asserts, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) instructs as to the methods which may be utilized to assert such rights. In *Tinker*, as here, the students were punished "for a silent, passive expression of opinion unaccompanied by any disorder or disturbance on [their] part . . ." 393 U.S. at 508. Such "silent, passive expression of opinion" is completely valid and cannot be punished because officials desire to avoid the "discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. They must show that the prohibited speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Ibid.* And

the burden is on the officials to make such a showing. See *Frain* v. *Baron,* 307 F. Supp. 27 (E.D.N.Y. 1969).

The so-called "no walkout" rule, seized upon by the defendants and the district court as a justification for petitioner's discipline, falls far short of *Tinker's* requirements. Cf., *Frain* v. *Baron, supra; Sword* v. *Fox,* 317 F. Supp. 1055 (D.C. W. Va. 1970). Assuming *arguendo* that the "rule" advanced legitimate school interests, its application cannot justify petitioner's dismissal. That dismissal was allegedly based on two infractions—violating the walkout rule and engaging in a "racial incident." Absent the ban on walking out, petitioner's expression of conscience could not have been punished as a forbidden racial incident. In the First Amendment area, where a prohibited ground is part of a punitive determination, the decision cannot stand. See *Street* v. *New York,* 394 U.S. 576 (1969); *Stromberg* v. *California,* 283 U.S. 359 (1931).

Finally, once it became apparent that petitioner's walkout did not stem from a desire to avoid hard work—the "evil" that the rule was allegedly designed to prevent—then the school officials were obliged to seek an alternative less drastic than dismissal to vindicate their legitimate interests. See *Shelton* v. *Tucker,* 364 U.S. 479 (1960). Mr. Craighead testified to his willingness to let petitioner remain silent while "Dixie" was played. He should have at least attempted to implement some such compromise between the band's needs and the petitioner's beliefs. One suspects that the failure to do so stemmed from a sense of relief at the opportunity to remove this "trouble-maker" from the band.

In sum, the issues surrounding whether black students can be compelled to participate in the symbolism that "Dixie" represents are important ones. The decisions of

this Court clearly point to the conclusion that there is a constitutionally protected right to refrain from participation. This Court should grant the writ and so hold.

2. The decision below seriously limits the intended efficacy of the class action Rule as a procedural method for vindicating federally protected rights.

The Court of Appeals held that the gravamen of petitioner's claim with regard to "Dixie" was a denial of First Amendment rights and that such rights could not be asserted on behalf of the class of all blacks in Tennessee, App. *infra,* pp. 4a-6a. This ruling reflects a misunderstanding of the nature of petitioner's claims. But more importantly, the opinion below embodies an overly restrictive view of Rule 23, Federal Rules of Civil Procedure, an interpretation which undercuts the purposes of that Rule and is in conflict with the approach taken in various other Circuits.

First, the petitioners did not advance only First Amendment claims with regard to the "Dixie" episode. They drew upon two sources—the rights of expression and conscience protected by the First Amendment, and also the right to equality affirmed by the Thirteenth and Fourteenth Amendments. Cf. *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968); *Street* v. *New York, supra; Smith* v. *St. Tammany Parish School Board, supra.* Petitioner claimed the right to refrain from participation in a certain type of ceremony because that ceremony was a relic of slavery antecedents and offensive to the guarantees of racial equality. In effect, the First Amendment afforded the mechanism—passive nonparticipation, see *West Virginia State Board of Education* v. *Barnette*—for asserting rights protected by the Civil War Amendments. Moreover, the claim was not limited

to "a unique fact situation". The record demonstrated that the playing of "Dixie" was widespread as was black resentment of it. Accordingly, petitioners were appropriate representatives to assert "the rights of Negro citizens to be not required to participate in racially discriminatory programs and ceremonies as a condition of participating in public school activities and programs and employment." App., *infra,* p. 13a.

It is of course settled that to the extent petitioners were asserting First Amendment claims the procedures of Rule 23 were available to them. See, e.g., *Schnell* v. *City of Chicago,* 407 F.2d 1084 (7th Cir. 1969); *Snyder* v. *Board of Trustees of the University of Illinois,* 286 F. Supp. 927 (N.D. Ill. 1968); *Sullivan* v. *Houston Independent School District,* 307 F. Supp. 1328 (S.D. Tex. 1969). *Sullivan* is particularly apposite since it involved First Amendment claims by secondary school students, and the court held that the named plaintiffs who had been disciplined for distributing a newspaper were proper representatives of the class of all secondary school students in Houston. *Id.* at 1337-38. Also relevant are cases which have allowed class actions to challenge vagrancy statutes and police practices under them. See, e.g., *Broughton* v. *Brewer,* 298 F. Supp. 260 (N.D. Ala. 1969); *Smith* v. *Hill,* 285 F. Supp. 556 (E.D. N.C. 1968).

These cases show that Rule 23 has served a variety of plaintiffs asserting First Amendment type claims on behalf of broad classes, even though the named plaintiffs' own rights were infringed only once or even just potentially. The narrow reading of Rule 23 in First Amendment cases by the court below is in conflict with these rulings. The conflict should be resolved by this Court.

Of course, to the extent that petitioners were asserting the right to be free from racial discrimination and from the "badges and indicia" of slavery, the class action procedure was most appropriate. The very purpose of section (b)(2) of Rule 23 was to afford an effective remedy in civil rights cases. See, Notes of Advisory Committee on Rules. Without its availability, much of the desegregation litigation would have been impracticable. See, *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 34-35 (5th Cir. 1968); *Buckner* v. *County School Board of Greene County, Virginia,* 332 F.2d 452 (4th Cir. 1964, *en banc*); cf. *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964).

The petitioners sought to represent the rights of blacks throughout the state with regard to a common practice alleged to be discriminatory. Not only were they proper representatives of their class, but they properly characterized the defendants as representatives of their classes. See *Washington* v. *Lee,* 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam,* 390 U.S. 333 (1968).

The decision below seriously undercuts the purpose of Rule 23. The Court should grant certiorari to reaffirm the importance of class actions as a method of vindicating civil rights.

3. This case raises important questions concerning the proper application of the doctrine of mootness pending appeal.

The majority below surveyed this Court's decisions on mootness and concluded that because petitioners had moved to another community in the State pending the appeal, most of the issues were moot, App., *infra,* pp. 6a-9a. The dissenting opinion, relying on *United States* v. *W. T. Grant*

Co., 345 U.S. 629 (1953), concluded that the issues were not moot because "the problems . . . are public issues of a continuing and recurring nature both in this high school and many others subject to recent integration orders," App., *infra*, p. 18a.

This disagreement below reflects what one commentator has referred to as a "recurrent problem" for this Court:

> where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal—adverse interest and effective remedy—have arguably been compromised. Note, *Mootness on Appeal*, 83 HARV. L. REV. 1672, 1674 (1970).

Unlike the usual situation where the mootness issue is raised for the first time in this Court, e.g., *Sibron* v. *New York*, 392 U.S. 40 (1968), here the question was fully considered by the Court of Appeals, and this Court has the opportunity to resolve this troublesome issue with the benefit of that discussion.

First, it is settled that if the petitioners were proper representatives of the class they alleged, see point 2, *supra*, then the case could not become mooted by reason of the change in petitioners' circumstances. One of the essential benefits of a class action is that it cannot be dismissed because of events surrounding the named plaintiffs. See, e.g., *Jenkins* v. *United Gas Corp.*, *supra*; *Cypress* v. *Newport News General Nonsectarian Hospital*, 375 F.2d 648 (4th Cir. 1967, *en banc*); *Gaddis* v. *Wyman*, 304 F. Supp. 713 (S.D.N.Y. 1969); but see, *Watkins* v. *Chicago Housing Authority*, 406 F.2d 1234 (7th Cir. 1969); cf., *Brockington* v. *Rhodes*, 396 F.2d 41 (1969) (holding a case moot, but

noting that petitioner had not brought a class action or sought declaratory relief).

But assuming *arguendo* that petitioners did not represent a class with regard to the "Dixie" and religious exercises issues, there are still substantial reasons why this Court should hold that the case is not moot.[6]

Two concerns underlie the mootness doctrine. The first is whether the court can enter an effective order. Here, the fundamental disputes remain unresolved. The song "Dixie" continues to be played on ceremonial occasions and this Court could, at least, declare the rights of black citizens in such situations. As the Fifth Circuit noted in a similar case:

> A case is moot when there is "no longer a subject matter on which the judgment of this Court [can] operate." *St. Pierre* v. *United States* . . . . Obviously that description does not fit here; assuming that the [state reform schools] are in fact segregated . . . we could render an effective decree, responsive to the complaint. Only permanent—demonstrably permanent—desegregation of the schools would render this case moot." *Singleton* v. *Board of Commissioners of the State Institutions, supra* at 773.

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[6] There is some authority for the view that even in a non-class action the plaintiff's moving to another locale does not necessarily moot the case. See *Pierce* v. *LaVallee*, 293 F.2d 233 (2d Cir. 1961); *Rackley* v. *Board of Trustees of Orangeburg Regional Hospital*, 238 F. Supp. 512 (E.D.S.C. 1965). Moreover, since petitioner remains a high school student in Tennessee there can be little question of his standing to raise these substantive issues. See *Singleton* v. *Board of Commissioners of State Institutions*, 356 F.2d 771 (5th Cir. 1966); *Marable* v. *Alabama Mental Health Board*, 297 F. Supp. 291 (M.D. Ala. 1969).

The other element involved in the mootness doctrine is a concern that litigation will have the requisite adverseness. Yet on various occasions this Court has relaxed this requirement in order to resolve the merits of an important controversy. E.g., *Southern Pacific Co.* v. *ICC,* 219 U.S. 498 (1911); *United States* v. *W. T. Grant Co., supra; Sibron* v. *New York, supra; Carroll* v. *President and Commissioners,* 393 U.S. 175 (1968); *Moore* v. *Oglivie,* 394 U.S. 814 (1969); see generally, Note, *Mootness on Appeal, supra* at 1677-87. In these cases the Court has indicated that issues of public importance, such as the ones here, should be decided so long as the policies of the mootness doctrine are not impaired. And it has been suggested that in cases like the instant one, such a liberalization of mootness requirements is particularly in order. See Note, *Mootness on Appeal, supra* at 1688-89. Some Circuit courts have already taken such an approach in cases involving important constitutional issues even though the episode that prompted the litigation was isolated and might not reoccur. See, *Jeannette Rankin Brigade* v. *Chief of the Capitol Police,* 421 F.2d 1090 (D.C. Cir. 1969); *Esteban* v. *Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969), *cert. denied,* 398 U.S. 965 (1970); *Schnell* v. *City of Chicago, supra.*

These questions surrounding the modern application of the mootness doctrine are sufficiently important to warrant this Court's resolution.

4. Mrs. Caldwell's dismissal from employment was based, at least in part, on unconstitutional factors.

Both the District Court and the majority below concluded that the main reason for Mrs. Caldwell's dismissal was her

alleged incompetence in performing her job. Judge Edwards disagreed, noting that the majority applied an improper standard of review and concluding that the dismissal violated petitioner's First Amendment rights, App., *infra,* pp. 19a-20a.

There are two reasons why the decisions below cannot stand. First, even assuming there was a showing that petitioner performed her work less than satisfactorily, the defendants agreed that other factors were relied upon as well. These factors—her support for her son's protest and her criticism of school officials and policies—cannot constitutionally be taken into account in a decision to terminate employment. *Pickering* v. *Board of Education,* 391 U.S. 563 (1968). If such factors were components in the decision, they taint what might otherwise have been legitimate grounds. See *Stromberg* v. *California, supra; Street* v. *New York, supra.*

Secondly, petitioner's dismissal must be viewed against the background of a barely integrated high school with only one black employee on the staff, about whom a file of complaints was immediately started. When there is a constitutional command to desegregate faculties as well as student bodies, *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969), a dismissal based even in part on "racial" factors cannot stand. *Johnson* v. *Branch,* 364 F.2d 177 (4th Cir. 1966); *cert. denied,* 385 U.S. 1033 (1967).

5. The defendants' ex parte submission of a file of unsworn statements, highly material to the issues in the case, deprived the petitioners of a fair hearing.

The Court of Appeals characterized the submission of these documents as, in effect, harmless error. But these

statements were central to the defendants' case. Indeed, the record indicates that the District Court was unpersuaded by the defendants' other evidence, and it is understandable why the defendants felt compelled to submit the material. Of course, the petitioners received no notice that this had been done until after the district court's decision. It is more than likely that the court considered the material, and that the petitioners' right to a fair hearing was thereby compromised. See *Los Angeles Trust Deed & Mortgage Exchange* v. *SEC,* 264 F.2d 199 (9th Cir. 1959).

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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January 25, 1971

Opinion of the United States Court of Appeals, Sixth Circuit

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19776

MAE CALDWELL, individually and on behalf of her minor son, CHARLES CALDWELL, and all others similarly situated,

Plaintiffs-Appellants,

—v.—

DONALD CRAIGHEAD, as Band Instructor at Lebanon High School, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Decided and Filed September 25, 1970.

Before:

EDWARDS and BROOKS, *Circuit Judges,* and O'SULLIVAN, *Senior Circuit Judge.*

BROOKS, *Circuit Judge*:

This case on appeal is styled as a class action. It purports to raise constitutional issues of free speech, racial discrimination and violation of the Establishment Clause of the Constitution of the United States. A synopsis of the events surrounding this litigation shows that there may well be involved constitutional questions of the magnitude alleged.

Appellant Charles Caldwell, a Negro, contends that his constitutional rights (numerous constitutionally guaranteed rights have been allegedly infringed) were violated when he was suspended from participating in high school band activities at Lebanon High School because he quit playing his instrument and left the gymnasium when the pep band he was in started playing "Dixie" at a pep rally. Appellant Mae Caldwell, Charles' mother, alleges she was discharged from her job as a teacher's aide at the high school in retaliation for the support she showed her son in his protest. Apparently she was standing at the entrance of the gymnasium, and when her son left she too walked out. Finally, both appellants challenge the constitutionality of certain Christian religious services conducted by the high school during regular school hours.

The District Court proceeded directly to the merits of the case and following trial held that: Charles Caldwell's expulsion from band activities was a legitimate disciplinary dismissal made pursuant to a valid band regulation; Mae Caldwell's services were "terminated due to her unsatisfactory work" and not as a result of her supporting her son's protest; and that appellants lacked standing to challenge the constitutionality of the school conducting religious services. (This issue was presented for the District Court's consideration in a supplemental amendment to the original complaint. It seems to have been added as an afterthought. Because of the District Court's decision that appellants lacked standing, the merits of the question were not reached.)

In considering this appeal, it must be first determined whether, in fact, this action is properly brought as a class action. The District Court did not determine whether the action should have been maintained as a class action and

enter the order required by Rule 23(c) of the Federal Rules of Civil Procedure. Therefore, for the purposes of jurisdiction, procedural and substantive due process and to determine the binding effect of any judgment in this matter, it must be decided if this is a proper class action. There is some question as to the correct appellate procedure to be followed when there has not previously been made a determination of whether an action is maintainable as a class action. However, the importance of the notice requirements of Rule 23 and the effect a judgment will have on absent members of the so-called class makes it imperative that the propriety of maintaining a class action be examined. If this issue has not been considered before the action comes to a reviewing court, it would appear the better practice, for reasons of judicial economy, for the appellate court to make such a determination on the basis of the record before it, rather than remanding for a decision on this question.

Appellants' complaint states that they meet the prerequisites for maintaining a class action contained in Federal Rules of Civil Procedure 23(a) *and* 23(b)(1), (2) and (3). Thus, they have alleged the broadest possible type of class representation.[1] The class of individuals

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[1] Rules 23(b)(1)(2) and (3) are phrased in the disjunctive. They roughly correspond to what was the true, hybrid and spurious class action under old Rule 23. See 3B Moore Federal Practice § 23.01 [11.1-11.4]. Under the old Rule, civil rights actions, especially racial desegregation suits, were often brought as either true, e.g. *Whitmyer* v. *Lincoln Parish School*, 75 F. Supp. 686 (1948) or spurious class actions, e.g. *Lopez* v. *Seccombe*, 71 F. Supp. 769 (1944). The Advisory Committee Notes suggest that under the new Rule, 23(b)(2) is the vehicle to be employed in civil rights cases. While there is nothing inherently wrong about appellants' alleging class representation under all three provisions of Rule 23(b), it is highly unlikely that such inclusive representation would, in fact, exist.

appellants purport to represent in this litigation are all the Negroes in the State of Tennessee. Furthermore, appellants have sought to bind by any determination in this matter not only the specifically named defendants but the class of "all public school band instructors, superintendents of schools, public high school principals, and boards of education and their members in the State of Tennessee."

To decide whether this action is maintainable as a class action, the character of the interests sought to be protected by the named parties in this action must be examined and compared with those interests allegedly held in common by the group of individuals the named parties seek to represent.[2] The gravamen of appellant Charles Caldwell's cause of action is denial of his First Amendment right to free speech.[3] Allegations are made throughout the complaint that Charles' dismissal resulted from and was a deliberate act of racial discrimination. A reading of the complaint and a study of the facts surrounding this litigation reveal that the incident out of which this dispute arose obviously had racial overtones. However, conduct amounting to racial discrimination and conduct which denotes racial hostility or prejudices are not identical in the eyes of the law. While prejudice and hostility based on race are moral wrongs, unless they take concrete shape in the form of an unfair or injurious distinction (discrimination), they are not legal wrongs. Mere allegations of racial discrimination without a basis in objective fact do not make out a cause for relief

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[2] We set out those portions of the complaint which purport to establish the appellants and appellees represent their respectively named classes in appendix to this opinion.

[3] That portion of the complaint setting out Charles Caldwell's cause of action alleges denial of rights protected by the First, Ninth, Thirteenth and Fourteenth Amendments of the Constitution.

on these grounds. Charles Caldwell's complaint alleges and the thrust of his proof was designed to prove that he was disciplined for exercising his First Amendment right of free speech. He has not made out a case for the proposition that his disciplining was a result of racial discrimination. Similarly, Mrs. Caldwell's dismissal, while alleged to be a "retaliatory act of racial discrimination," a fair reading of her complaint indicates that if the allegations are true she was discharged for exercising her right to free speech by engaging in conduct expressing her support of Charles' protest.

The fact that these were Negroes who were allegedly exercising their freedom of speech on a subject having racial characteristics tends to blur the true nature of the high school officials' conduct drawn into question by this litigation. Stripping away all overtones of race involved here, which in and of themselves do not amount to racial discrimination, this controversy can be recognized for what it is—a dispute over alleged infringement of First Amendment rights.

This leads to the issue involved, that is, determining whether this action is properly maintainable as a class action. There is no doubt that if this were an action to remedy racial discrimination in education or employment practices, appellants could exert their rights to be free from injurious and arbitrary distinctions based on race through the class action device. See *Whitmyer* v. *Lincoln Parish School Board,* 75 F. Supp. 686 (1948) and *Potts* v. *Flax,* 313 F.2d 284 (5th Cir. 1963); *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County, South Carolina,* 311 F.2d 107 (4th Cir. 1962). In that type of case, appellants would be able to represent the class of all Negroes in the State of Tennessee who are similarly

situated. However, here we have two plaintiffs attempting to enforce their individual rights in a form which makes them representative of a select segment of the population of a state, the Negro population, when the entire citizenry are equally guaranteed these rights. As an abstract and general proposition, these appellants have a guaranteed right or claim which is common and shared by all citizens of this country. However, on an individual and more concrete level, the rights appellants are attempting to enforce are separate and distinguishable from the broad and amorphous general right to free speech guaranteed to all citizens of the United States. In short, we hold that the rights appellants are allegedly attempting to enforce in this action are individual rights arising out of a unique fact situation, and the class action technique is not designed to be used in these types of cases.

These same observations apply with equal force to the defendants' so-called "class". Here the requirement that the defenses of the representative parties be typical of those of the class cannot be met. Nor can it be said that there are questions of law or fact common or shared by the named defendants, and the much larger class they are supposed to represent in this litigation. At best, appellants can only make defendants those individuals specifically named in the complaint.

The effect of this determination of this question is to deny the named plaintiffs and defendants any representative capacity for unnamed members of their so-called class. Thus, the parties in this litigation are reduced to two plaintiffs and ten defendants. Since eliminating the class action name given to this action does not necessarily result in loss of the federal jurisdiction, see *Harris* v. *Palm Springs Alpine Estates*, 329 F.2d 909 (9th Cir. 1964), an

issue which might affect the power to render a decision in this matter must now be considered.

It appears that Charles Caldwell and his family have moved from Lebanon to Nashville, Tennessee. Charles is presently enrolled in a high school where "Dixie" is either not played or he is not required to play it. Having had these facts presented, it must be considered whether this conduct of one of the litigants, subsequent to initiation of this lawsuit, moots the action.

While Charles' complaint prays for declaratory and injunctive relief, it is clear that this does not affect the requirement that a federal court should not decide hypothetical or mooted questions. *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227 (1937); *Watkins* v. *Chicago Housing Authority*, 406 F.2d 1234 (7th Cir. 1969). The test of whether a controversy is moot involves several considerations. The absence or presence of any single factor is not necessarily determinative of whether a justiciable controversy exists. In *United States* v. *Alaska Steamship Company*, 253 U.S. 113, 116 (1920), it is stated that a case becomes moot when "by an act of the parties, or a subsequent law, the existing controversy has come to an end . . . ." and a court is not empowered "to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." In *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947), the constitutionality of the Hatch Act passed by Congress was drawn into question. On the question of mootness the Court observed that "[t]he power of courts . . . to pass upon the constitutionality of acts of Congress arises only *when the interests of litigants require the use of this judicial authority for their protection against actual interference.*" (Em-

phasis supplied.) Finally, it is stated that a controversy is moot when a court cannot render an effective decree responsive to the complaint, *Singleton* v. *Board of Commissioners of State Institutions*, 356 F.2d 771 (5th Cir. 1966), because there is "no longer a subject matter on which the judgment . . . [can] operate." *St. Pierre* v. *United States*, 319 U.S. 41 (1943).

Charles Caldwell is no longer a student in the Lebanon School system. His individual right to free speech which was allegedly infringed by the Lebanon High School officials can no longer be interfered with by these defendants. At best, an extremely remote chance exists that the high school officials' alleged wrongful conduct will be repeated and directed at Charles to deny him his right to free speech. See *United States* v. *W. T. Grant Company*, 345 U.S. 629 (1953). For all intents and purposes, the controversy between Charles Caldwell and certain named officials of the Lebanon School system has come to an end. Any decision or decree made as to these parties cannot now affect their relative positions. It would serve no purpose to order Charles to be reinstated in the band as he is no longer even a part of the school system. While a declaration of his rights might be undertaken, this would merely be a hypothetical ruling as between these parties, since Charles stood alone in this litigation and not as a representative of any class of individual. In addition, although this matter has generated public concern, the nature of the case itself, that is, a single individual alleging infringement of his right to free speech, does not make this dispute one of a "general public interest" requiring a decision even if many attributes of mootness exist. See *United States* v. *W. T. Grant Company, supra* at page 632. It is concluded, therefore, that Charles' claim

raised in this action has been mooted and there is no need to reach the merits of his appeal.

While appellant Mae Caldwell also is no longer a part of the Lebanon High School system, she has prayed for monetary relief for lost wages resulting from her alleged wrongful discharge. Thus, her action is a viable cause of action and the merits of her appeal must be considered.

As previously discussed, Mrs. Caldwell's complaint contends that her dismissal from her position as a teacher's aide was a "retaliatory act of racial discrimination." It was alleged that her dismissal "violated her First Amendment right to freedom of expression, her rights guaranteed under the Ninth Amendment, the right not to have her son subjected to a badge or indicia of slavery as forbidden by the Thirteenth Amendment, and the right to due process and equal protection of the laws under the Fourteenth Amendment . . . ."

Thus, a problem is presented of whether this dismissal was a result of 1.) racial discrimination, or 2.) because Mrs. Caldwell supported her son in his protest, or 3.) because she was incompetent as a teacher's aide, or 4.) a portion or all of the above. While the record is not completely devoid of racial implications in Mrs. Caldwell's dismissal, the District Court found that racial discrimination was not the cause of her being discharged. It is clear that she was hired for the teacher's aide job with full knowledge that she was a Negro and it seems somewhat illogical that she would be fired solely because she was a Negro.

Appellant's case is stronger for the proposition that she was discharged in retaliation for the support she showed her son in his protest. If this was the case it raises questions concerning the permissive scope of control an

employer can exercise over an employee. That is, can an employer, as a prerequisite of employment, require that an employee refrain during actual work periods from certain conduct otherwise constitutionally protected and legitimate. While it would appear that there arises from the contractual relationship of employer-employee a right in the employer to place reasonable restrictions upon an employee's sphere of permissible conduct during actual work period, on the basis of the record in this case, it is not necessary to reach this broader question. The District Court found that Mrs. Caldwell's dismissal was prompted by the fact that she performed inadequately as a teacher's aide. There was testimony that she typed poorly, spent excessive time in the lounge area and took unduly long lunch breaks. In addition, there is evidence that her general attitude was poor, she adversely affected the morale of other employees, and that she refused to cooperate with several of the teachers. There had been serious discussions before the time of the "Dixie" incident about dismissing her because of her incompetency. The findings of the trial court on this issue, which are supported by credible evidence, are not clearly erroneous and indicate that the actual rationale behind Mrs. Caldwell's discharge was her failure to perform adequately at her job. Mrs. Caldwell argues that certain unsworn statements filed after the trial which reflected upon her qualifications and performance on the job should not have been considered by the District Court in making its decision since she was not given an opportunity to refute the accusations contained in them. This evidence, if considered by the District Judge, was incompetent, but we have already concluded there was substantial competent evidence properly before him to support his decision. This Court will not "reverse a trial court in a nonjury case for having admitted incom-

petent evidence, whether objected to or not, unless all of the competent evidence is insufficient to support the judgment appealed from or unless it affirmatively appears from the record that the incompetent evidence complained of was relied upon by the trial court and induced the court to make an essential finding which would not otherwise have been made." *Thompson* v. *Carley,* 140 F.2d 656, 660 (8th Cir. 1944); *Builders Steel Company* v. *Commissioner of Internal Revenue,* 179 F.2d 377, 379 (8th Cir. 1950); *Herlihy Mid-Continent Company* v. *Northern Indiana Service Company,* 245 F.2d 440, 444 (7th Cir. 1957), *cert. denied,* 355 U.S. 894; *Process Steel Inc.* v. *Mosley Machinery Company, Inc.,* —— F.2d —— (6th Cir. 1970).

The final issue to be considered is whether these appellants lacked standing to challenge the constitutionality of the Christian religious services conducted during regular school hours at the high school. Appellants' complaint alleges that in this cause of action they represent the same class of individuals (all the Negroes in the State of Tennessee) as in their first two causes of action. They also allege that defendants stand in the identical representative capacity as in the first two causes of action. Particularly with respect to this portion of litigation, appellants' contention that this is a class action is erroneous. There is no conceivable rationale why, in pressing this specific claim, appellants should only represent the Negroes in the State of Tennessee. Nor is there any basis in reasoned thought why the named defendants should represent all individuals similarly situated when there are no allegations that common facts or law link the named defendants with their so-called class. At best, appellants stand alone in this part of the litigation and challenge the actions of only certain named officials of the Lebanon School system as defendants.

On the issue of standing, the District Court ruled that since appellants did "not allege any personal injury, or the infringement of any personal right" they lacked the necessary standing to challenge the high school's conducting of religious services. Emphasis was also placed on the fact that attendance at the services was voluntary. We conclude the District Court erred in its ruling on the question of standing. It is alleged in the complaint that Charles is a student at the high school and Mrs. Caldwell is his mother. In challenging the constitutionality of these types of religious services, there is sufficient interest to sue if the parties are either students enrolled in the institution where the services are carried on or are parents of the students.[4] *Sub silentio, School District of Abington Township, Pennsylvania* v. *Schempp,* 374 U.S. 203 (1963). The fact that attendance at the services is voluntary does not affect appellants' standing to sue. Once it was argued that the voluntariness of attendance at the services would affect the constitutionality of the practice, but this has since been rejected by the Supreme Court. See *Engel* v. *Vitale,* 370 U.S. 421 (1962).

While appellants meet one aspect of justiciability, that is, standing to sue, it is concluded for the same reasons discussed with regard to Charles Caldwell's cause of action, that this Establishment Clause controversy between the named parties has been mooted as a result of appellants leaving the school system.

Affirmed in part, dismissed in part.

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[4] Appellants argue on this appeal that *Flast* v. *Cohen,* 392 U.S. 83 (1968) supports their position on standing. However, there are no allegations in their complaint that they are taxpayers and thus they must and do rely on their status as student and parent to give them standing.

APPENDIX

PARTIES

The plaintiffs bring this action on their own behalf and on behalf of all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The prerequisites of subsections (a), (b)(1) and (b)(2) of that rule are satisfied. There are common questions of law and fact affecting the several rights of Negro children to participate in racially integrated public school activities and programs and to have members of their race serve in positions of public employment therein without racial discrimination. Additionally involved are the rights of Negro citizens to be not required to participate in racially discriminatory programs and ceremonies as a condition of participating in public school activities and programs and employment. The members of plaintiffs' class (the Negro citizens of Wilson County and Tennessee) and defendants' class (all public school band instructors, superintendents of schools, public high school principals, and boards of education and their members in the State of Tennessee) are so numerous as to make it impracticable to bring them all before this Court. The claims of the plaintiffs are typical of the claims of the class and the relief sought against all members of their class. A common relief is sought. The interests of the class are adequately represented by plaintiffs and defendants. The prosecution of separate actions by individual members of the class would create a risk of: (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible

standards of conduct for the parties opposing the class, or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Furthermore, the parties opposing the class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs are Negro citizens of Wilson County, Tennessee, Mae Caldwell being over the age of 21 years. Plaintiff Charles Caldwell is 14 years of age and a freshman student at Lebanon High School. Until January 3, 1969, he was a member of four of the school's bands. Plaintiff Mae Caldwell was employed as a teacher's aide at Lebanon High School until January 31, 1969.

Numerous other Negroes are members of the school bands in racially integrated schools in the State of Tennessee and other Negroes are employed as teachers or teacher's aides therein.

Defendants are over the age of 21 years, reside in Wilson County, Tennessee and are members of the white race. Defendant Donald Craighead is the band instructor at Lebanon High School, and is sued in his official capacity, and as representative of that class consisting of all public school band instructors in Tennessee. Defendant Erwin Reed is Superintendent of Schools for Wilson County, Tennessee, and is sued in his official capacity, and as repre-

sentative of that class consisting of all superintendents of schools in Tennessee. Defendant Barry Sutton is principal of Lebanon High School, and is sued in his official capacity, and as representative of that class consisting of all public high school principals in Tennessee. Defendants Kenneth Hackney, Dave Smith, Denver Bates, Pat Bryant, Claud Jennings, T. M. Dobson, and Carl Johnson are the members of defendant Board of Education of Wilson County, Tennessee, duly elected by the voters of Wilson County, Tennessee; they are sued in their official capacity as board members and they and defendant Board of Education are sued as representatives of that class consisting of all boards of education and their members in the State of Tennessee.

EDWARDS, *Circuit J.* dissenting:

This is a civil rights case presenting five issues: It originated in the integrated Lebanon High School near Nashville, Tennessee. It was heard before the Nashville Division of the United States District Court for the Middle District of Tennessee. The District Judge found no constitutional violations on any issue and dismissed plaintiffs' complaints.

The two named plaintiffs are Charles Caldwell and his mother, Mrs. Marcus Caldwell. Charles in January of 1969 was a member of the high school band and a member of a subsidiary informal organization called the "Pep Band" which played at pep rallies before athletic events. At such a pep rally on January 3, the Pep Band played "Dixie." The key allegation in the complaint stated:

> "(13) When the band played "Dixie" on January 3, 1969, the white students showed great excitement, as

> is usual when it is played at Lebanon High School and at other high schools in Tennessee. A group of approximately twelve to fifteen white students began shouting derogatory racial comments in unison, such as "Nigger, go back and pick that cotton."

Defendants' answer denied all racial connotations.

It is undisputed that Charles refused to play, stepped out of the band, and accompanied by his mother, left the auditorium. The record indicates that this became a major episode in the school, with students and faculty talking about both mother and son.

Charles was expelled from the band. Twenty-eight days after the "Dixie" episode, Mrs. Caldwell's employment as a teacher-aide was terminated.

In March 1969 the Caldwells filed this action as a class action, seeking both injunctive relief, a declaratory judgment and, in Mrs. Caldwell's case, money damages for illegal discharge. The specific relief requested was reinstatement of Charles in the band, with a declaration that he did not need to play "Dixie" and restoration of Mrs. Caldwell's employment with backpay.

Defendants responded to these two issues by claiming that Charles Caldwell was expelled from the band for violating a nondiscriminatory rule (against leaving the band) and that Mrs. Caldwell was fired for inefficiency.

Additionally, after taking of depositions, plaintiffs amended their complaint by adding a count protesting religious instruction, which they claim was given during chapel services in the Lebanon High School during school hours in violation of the establishment clause of the First Amendment. The defendants responded to this portion of the complaint by admitting that there were ministers from

time to time who spoke at the high school convocations and did lead prayer or preach on bible topics. The Defendants stated that attendance at the chapel exercise was entirely voluntary and there had been no prior complaint about the content of the programs.

If these three issues were not sufficient, a fourth was added after the District Court hearing was concluded. (The only hearing conducted was a hearing on plaintiffs' motion for a temporary injunction.) Following that hearing and well before the District Judge's opinion and judgment were entered, defendants filed a 195-page exhibit consisting of unsworn statements by teachers and students about the Caldwells and the "Dixie" episode. It is conceded that appellants were not served with this material, nor informed that it had been filed, and learned about it only after the Judge's opinion and judgment had been released and upon inspection of the court file. But the document is a part of the case file as it has been forwarded to us. And appellees brief before the District Judge relied in part upon this "exhibit."

On May 7, 1969, the District Judge decided the case, holding that Charles had not been expelled from the band for refusing to play "Dixie" but had been expelled because he had violated a well-known and on its face nondiscriminatory rule that no one could walk out of the bank without suffering the penalty of being denied readmission. He also held that Mrs. Caldwell's discharge was due to inefficiency in her work and the complaints which had been levied about her. He granted summary judgment in favor of the Defendants without taking detailed testimony or making findings of fact on the claim that the Lebanon High School chapel exercises offended the First Amendment provision against establishment of religion. In this regard he held that the Caldwells did not have standing to sue.

The fifth issue (upon which my brothers rely for disposition of most of the issues) was raised after appellate briefing and argument by appellants' motion to dismiss this appeal for mootness because the Caldwells have now moved to Nashville.

At the outset then we must determine whether the case is moot because the Caldwells and their son have now moved to Nashville and he has registered in another high school. To me it seems clear that the problems of this case are public issues of a continuing and recurring nature both in this high school and many others subject to recent integration orders. In the words of the Supreme Court, the

> "controversy . . . remain[s] to be settled . . . . The defendant is free to return to his old ways. . . . [There is] a public interest in having the legality of the practices settled . . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right . . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

The fact that Charles may not be re-entering Lebanon High School does not terminate this court's jurisdiction over the protested application of the band exclusion rule. *Carrol* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 179 (1969); *Division 1287, Bus Employees* v. *Missouri*, 374 U.S. 74 (1963); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). Nor do I think it ends the controversy over the chapel exercises. The band expulsion rule and the religious chapel exercises are "unresolved disputes." *Division 1287, Bus Employees* v. *Missouri, supra*, at 78. Of course Mrs.

Caldwell's complaint alleging discriminatory discharge and claiming backpay cannot by any logic be considered moot.

Additionally, while I agree with much of the majority opinion analysis of the deficiencies of Plaintiffs' class action claims, I think that they should have been read, at a minimum, as stating a class action for all Negro students in the band at Lebanon High School.

In disposing of the basic issues I would deal first with the District Judge's grant of summary judgment on the establishment of religion complaint where he held Plaintiffs did not have standing to sue. This holding is not consistent with settled law involving the question of standing. A high school student and his parent have sufficient interest to raise the establishment issue; *School Dist. of Abington Twp., Pa.* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962). See also *Flast* v. *Cohen,* 392 U.S. 83 (1968). In the *Schempp* case the Supreme Court held:

> "The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." 374 U.S. at 224 n. 9.

In view of the incomplete record on the establishment issue, summary judgment was inappropriate and the case should be reversed and remanded for trial on the standards of *Schempp, supra.*

I also believe that the District Court judgment should be reversed on the question of Mrs. Caldwell's discharge. On asserted First and Fourteenth Amendment issues such as these we are not allowed to accept the findings of the District Judge solely because we do not consider them "clearly erroneous" within the terms of Rule 52 Fed. R.

Civ. P. We are required to make our own independent review of the entire record. *Pennekamp* v. *Florida,* 328 U.S. 331, 335 (1946); *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963); *Jacobellis* v. *Ohio,* 378 U.S. 184, 189 (1964).

The testimony of the school principal as contained in the record clearly shows that on the heels of the "Dixie" episode, the principal was concerned because teachers were threatening to quit because of Mrs. Caldwell's unrebuked participation in the "Dixie" episode. The principal had a conversation with Mrs. Caldwell in which he did rebuke her for participating in Charles' walkout. All this strongly suggests that Mrs. Caldwell was not dismissed because of work deficiencies alone but that in fact the "Dixie" incident was the triggering episode.

Over and above that, plaintiffs alleged and defendants concede that Mrs. Caldwell was the only Negro teacher or teacher-aide in the Lebanon High School, and that with her discharge, there were none.

In my judgment this record indicates that absent Mrs. Caldwell's public expressions of sympathy with her son's protest against playing "Dixie," she would have continued in her employment at least until the end of the school year. It seems clear to me that Mrs. Caldwell violated no school rules in her expressions of sympathy and that they were protected by the First Amendment. *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). I would remand for the computation and entry of a backpay judgment for that period and for taking of proofs on any other damage claim related thereto.

The most difficult issue in this case is the one which gave birth to this litigation—Charles Caldwell's walkout on the

playing of "Dixie" and his subsequent expulsion from the band. In my view a fair determination of the facts involved in this episode is a condition precedent to determining whether Charles' walkout was a constitutionally protected response to the racially inspired harassment alleged in the complaint or whether it was, as Defendants contend, simply an unwarranted violation of a nondiscriminatory rule nondiscriminatorily applied. The District Judge made no findings on the harassment claim. In addition the introduction of 195 pages of extra-judicial comment, much of it bearing on these very questions, seems to me to have so prejudiced the fairness of the hearing as to require vacation of this judgment and remand for new trial of these issues.

The guidelines for decision in that new hearing are set forth, at least in part in *Board of Education* v. *Barnette,* 319 U.S. 624 (1943). In *Barnette* the United States Supreme Court held that the state of West Virginia could not expel from its schools students who declined on grounds of conscience to salute and pledge allegiance to the American flag.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. *supra* at 642.

If the First Amendment protects against state compulsion to pledge allegiance to our country's flag, it must also protect from state expulsion a student who on conscience grounds refuses to play a song which became the marching song of the one nearly successful attempt to overthrow the government of the United States by force and violence.

But, of course, as the District Judge and my colleagues point out, Charles Caldwell was expelled from the band not for refusing to play "Dixie" but for walking out. Thus before this court passes on his expulsion there should first be a factual resolution of whether, as charged by Plaintiffs and denied by Defendants, the playing of "Dixie" at Lebanon High School inspired and was accompanied by shouts of "Nigger, go back and pick that cotton."

It seems entirely possible to me that the state might be able to command Charles Caldwell to stand still while others played "Dixie" as a part of a normal music program whether he participated in playing it or not. But if in fact the attendant circumstances made the playing of "Dixie" at Lebanon High School a method of racial harassment, the U. S. Constitution would certainly protect his right peaceably to walk away from such an episode without being deprived of part of his education. In my judgment the equal protection clause of the Fourteenth Amendment commands no less than this. *McLaurin* v. *Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1949).

I would reverse and remand for further proceedings in accordance with this opinion.

Opinion of the United States District Court, Middle District of Tennessee

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
Civil No. 5341

MAE CALDWELL, etc., *et al.*,

Plaintiffs,

—v.—

DONALD CRAIGHEAD, etc., *et al.*,

Defendants.

MEMORANDUM

This is an action for declaratory and injunctive relief in which the plaintiffs contend that certain actions by defendant school officials violated rights secured to them by the First, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, and by 42 U.S.C.A. §1983. Jurisdiction to decide the issues raised in this case is conferred on the Court by 28 U.S.C.A. §§1331, 1343.

The named plaintiffs are Charles Caldwell, a freshman at Lebanon High School, Lebanon, Wilson County, Tennessee, and his mother, Mrs. Mae Caldwell, formerly a teacher's aide at Lebanon High School. Both plaintiffs are Negroes. Named as defendants are Donald Craig-

head, Band Instructor at Lebanon High School; Barry Sutton, Principal of Lebanon High School; Erwin Reed, Superintendent of Schools for Wilson County; and the members of the Wilson County Board of Education.

The facts giving rise to the litigation are as follows. Plaintiff Mae Caldwell was employed by the Wilson County School Board in September, 1968, and assigned to Lebanon High School as a teacher's aide. Plaintiff Charles Caldwell enrolled in Lebanon High School as a freshman in September, 1968, and thereafter became a member of the Lebanon High School Band. On January 3, 1969, Charles Caldwell was playing the trumpet in the school's pep band at a rally held in the high school gymnasium. When the song "Dixie" was played, Charles stepped from the pep band and walked out of the gymnasium, accompanied by his mother. Subsequently, Charles Caldwell was dismissed from the band for the remainder of the school year, and on January 31, 1969, Mrs. Caldwell's services as a teacher's aide were terminated. It is plaintiff's insistence that Charles Caldwell was dismissed from the band for his refusal to play "Dixie", and that Mrs. Caldwell was dismissed as a teacher's aide because she supported her son in his refusal to play "Dixie".

In essence, plaintiffs contend that compelling Charles Caldwell, a Negro, to play the song "Dixie", an alleged badge of slavery, as a condition to full participation in Lebanon High School Band activities violates his constitutional rights under the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs ask that Charles Caldwell be readmitted to the Lebanon High School Band, and that he not be required to play "Dixie" in the future. For their part, defendants deny the factual allegations contained in plaintiff's propo-

sition of law. More specifically, defendants deny that Charles Caldwell was required or compelled to play "Dixie" as a condition to membership in the Lebanon High School Band. In addition, defendants deny that Charles was dismissed from the band for refusing to play the song "Dixie".

Mr. Craighead, the band director, testified that unlike the marching and concert bands, the pep band is a voluntary organization, which band members are not required to support. He further testified that no attendance records were maintained at the pep sessions. During Mr. Craighead's one year tenure at Lebanon High School, the song "Dixie" has not been played by the Lebanon High School Band, except at one football game.[1] "Dixie" was played exclusively by the volunteer pep band at pep rallies. At least one Negro band member has discontinued his association with the pep band, presumably because of his conscientious objection to playing "Dixie", without loss of status in the Lebanon High School Band. From the foregoing, it is clear that Charles Caldwell's presence in the pep band on January 3rd was a voluntary act, and that his status as a member of the Lebanon High School Band was in no sense conditioned on his playing the song "Dixie".

Mr. Craighead directly refuted the unsupported allegation that Charles Caldwell was dismissed from the band for refusing to play "Dixie". Rather, Craighead offered a two-fold reason for Charles' dismissal from the band for the remainder of the academic year. Earlier in the school year, Charles Caldwell had engaged in what Craighead described as a racial argument with a white female

[1] On that occasion, Charles Caldwell did not play the song because he did not know the music.

band member. As a result of the argument, both students were placed on probation and advised that any further racial incidents involving the band would result in their dismissal from the band.

In the fall of 1968, in response to a threatened walkout in protest of a band practice scheduled on a school holiday, Mr. Craighead had established the rule "that any person who walked out of the Band would not walk back in and I mean it." Mr. Craighead considered Charles Caldwell's action on January 3, 1969, a racial incident in direct violation of his rule[2] against walking out of band performances.[3] For these avowed reasons, he dismissed Charles from the band, with the right, as in all other disciplinary dismissals, to apply for readmission to the band the next year.

The Court concludes, as a matter of fact, that Charles Caldwell was not required to play the song "Dixie" in order to continue his musical education as a member of the Lebanon High School Band. In addition, the Court finds that Charles Caldwell was not dismissed from the Lebanon High School Band for his refusal to play "Dixie" with the pep band on January 3rd. He was dismissed from the band for walking out of a performance in direct violation of a disciplinary regulation. The rule against walkouts was a clear and specific one of which plaintiff Charles

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[2] Though the rule against walkouts was formulated in a different context, it was not limited by its terms to the factual situation which inspired it.

[3] Since Charles was dismissed for walking from the gymnasium during a band performance, it is impossible on this record to determine what repercussions, if any, would have resulted had Charles stood passively by while the pep band played "Dixie". There was testimony that on a prior occasion Charles did stand by while "Dixie" was played. Apparently, no disciplinary action was taken in that instance.

Caldwell had notice. It appears to the Court to be a reasonable and nondiscriminatory regulation as to time, place and manner of expression, well within the school authorities' powers to maintain discipline and decorum on the school grounds at school-sponsored events.[4] See *Tinker* v. *Des Moines Independent School District,* 89 S.Ct. 733 (1969); *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968); *Meyer* v. *Nebraska,* 262 U.S. 390, 402 (1923).

This opinion should not be read as expressing the view that students shed their constitutional rights to freedom of speech or of expression at the "schoolhouse gate." Rather, this is simply a case where the rules of school authorities do not collide with the First Amendment rights of students. No school rule compelled Charles Caldwell to violate the dictates of his conscience by playing "Dixie", thereby communicating his acceptance of the social ideas it allegedly bespeaks. See *West Va. State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). Nor was there a rule prohibiting Charles Caldwell from expressing his opinion of the song "Dixie", and what it symbolized to him about his race. See *Tinker* v. *Des Moines Independent School District, supra.* Under these circumstances, the Court finds no discord between the demands of the United States Constitution and the actions of the Lebanon High School officials, insofar as Charles Caldwell is concerned.

With regard to Mrs. Caldwell's dismissal, Mr. Barry Sutton, Principal of Lebanon High School, recommended to Mr. Erwin Reed, Superintendent of Wilson County

[4] Indeed, the Court does not understand plaintiffs to contend that walking from the gymnasium was a constitutionally protected form of dissent to the pep band's playing of "Dixie". In fact, plaintiffs concede in their brief that the pep band had the right to play "Dixie" for whatever reason they chose.

Schools, that Mrs. Caldwell's services as a teacher's aide be terminated due to her unsatisfactory work, specifically, for deficiencies in her typing and her work for other teachers. Mr. Sutton based his recommendation in part on written complaints from Lebanon High School teachers, dating back to September, 1968, stating variously that Mrs. Caldwell was incompetent, inefficient and possessed a poor attitude toward her work. Mrs. Caldwell admitted that she was not a proficient typist.

Mr. Reed testified that Mrs. Caldwell's unsatisfactory work was the primary reason for her dismissal. What Mr. Reed described as lack of loyalty to the school was an additional factor in Mrs. Caldwell's dismissal. Examples of this lack of loyalty cited by Mr. Reed included Mrs. Caldwell's challenging of teacher's methods; the challenging of their rating systems; and the spending of excessive time in the teacher's lounge.

It is upon this evidence that the Court must weigh plaintiff's contention that Mrs. Caldwell's dismissal was a retaliatory act of racial discrimination for her support of her son's refusal to play "Dixie". The only objective fact which might lend credence to plaintiff's claim is that Mrs. Caldwell's dismissal did occur subsequent to the "Dixie" incident—28 days after the incident to be specific. However, in light of the evidence with respect to Mrs. Caldwell's inability to perform her job, this fact, standing alone, is not sufficient to characterize her dismissal a retaliatory act of racial discrimination.[5]

/s/ WILLIAM E. MILLER
United States District Judge

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[5] Plaintiffs do not contend that Mrs. Caldwell's dismissal involved a denial of procedural due process of law.

ORDER

In accordance with the Memorandum filed by this Court on May 7, 1969, and for the reasons stated therein, plaintiffs' application for a preliminary injunction is hereby denied. Defendants are hereby allowed 10 days from date to answer or otherwise plead to the amended complaint filed on March 26, 1969. All further matters are reserved.

/s/ WILLIAM E. MILLER
United States District Judge

Order of the United States District Court, Middle District of Tennessee

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
Civil No. 5341

MAE CALDWELL, etc., *et al.*,
Plaintiffs,

—v.—

DONALD CRAIGHEAD, etc., *et al.*,
Defendants.

Plaintiffs in this action filed an amendment to their complaint on March 26, 1969. Defendants answered the amendment on May 19, 1969, and at the same time moved for summary judgment, dismissing and striking the amendment.

In their amendment, plaintiffs stated a fourth cause of action, alleging that "chapel services" conducted at Lebanon High School were in violation of the establishment clause of the First Amendment to the Constitution of the United States.

Plaintiffs admit that there is no material question of fact remaining, and agree that the case is ripe for summary judgment. Plaintiffs also stated, through their attorneys,

that they had no objection to the Court reaching a decision on the amended complaint without a formal hearing or oral argument.

In their answer, defendants admit that chapel services are conducted at the Lebanon High School, and that certain ministers and other speakers are allowed to address these services; and that "on some of the occasions certain of the speakers may offer prayers or read from the Bible."

Defendants also admit that these services are "generally attended by all students during regular school hours" at Lebanon High School. Defendants emphasize that such attendance has not been made compulsory.

In the amendment to the complaint, plaintiffs alleged that "Defendants customarily conduct Christian religious services, including prayer and reading from the Bible, at 'chapel services' customarily attended by all students during regular school hours at Lebanon High School." There appears to be no material difference in the statements of fact brought forth by both parties.

It is a principle of long standing that one without interest in the subject matter of a lawsuit has no legal standing to prosecute it. *Sharp v. Dohme, Inc.* v. *United States,* 144 F.2d 456 (3rd Cir., 1944).[1]

Ordinarily a party plaintiff must show a remedial interest in the cause of action asserted which the Court can enforce. No one can institute lawsuits to enforce obligations in which he has no concern. A party plaintiff must show some real, direct, present, and substantial right or interest in the subject matter of the controversy.

Defendants state in their answer that " . . . the Plaintiffs, Charles Caldwell, and Mae Caldwell, have not at any time

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[1] See the opinion of Chief Justice Marshall in *Corporation of Washington* v. *Young,* 23 U.S. 406 (1825).

to any of the Defendants, or any of the Defendants' agents or employees, offered any objection to any such religious exercise or program or have any of said plaintiffs requested or indicated by any means that the plaintiffs wished to be excused or relieved from attending any such program, exercise, or lecture."

In the amendment to the complaint plaintiffs do not allege any personal injury, or the infringement of any personal right. There is no claim that any of the plaintiffs were forced to attend such exercise, or that upon voluntary non-attendance, any disapprobation from others in the school or elsewhere was directed toward them.

Neither do plaintiffs allege any deprivation or violation of any of their constitutional rights.

Plaintiffs cannot be granted standing to sue merely on the bare allegation that exercises are being conducted in violation of the First Amendment of the Constitution—and nothing more.

For the above stated reasons, this Court is of the opinion that plaintiffs have not demonstrated that they have standing to present this complaint before the Court.

It is therefore ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment on the amendment to the complaint by plaintiffs be and it is hereby sustained, and the said amended complaint is hereby dismissed.

/s/ WILLIAM E. MILLER
United States District Judge